

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 9, 2004 Session

**BOBBY MacBRYAN GREEN v. JOHNSON CITY
REGIONAL PLANNING COMMISSION**

**Appeal from the Chancery Court for Washington County
No. 34902 G. Richard Johnson, Chancellor**

No. E2003-02509-COA-R3-CV - FILED SEPTEMBER 28, 2004

Bobby MacBryan Green (“Plaintiff”) and Michael May (“May”) own adjoining land within the city limits of Johnson City. May’s tract of land was subdivided into two lots as a minor subdivision without formal approval from the Johnson City Regional Planning Commission (the “Commission”). Plaintiff challenged the approval of the minor subdivision before the Commission. Relying on legal advice from the city attorney, the Commission voted unanimously not to take any action on Plaintiff’s request that the approval of the minor subdivision be rescinded. Plaintiff appealed to the Trial Court which upheld the decision of the Commission after concluding the Commission’s refusal to take any action on Plaintiff’s request was not illegal, arbitrary or capricious. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Chancery Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Bobby MacBryan Green, *pro se* Appellant.

James H. Epps, IV, Johnson City, Tennessee, for the Appellee Johnson City Regional Planning Commission.

OPINION

Background

Plaintiff owns real property located within the city limits of Johnson City, Tennessee. May owned approximately 2.12 acres of land located next to Plaintiff's property. On April 5, 2002, May's property was subdivided into two lots and the new plats were approved by James D. Moody ("Moody"), the Assistant Secretary of the Johnson City Regional Planning Commission, and duly filed. The plats contained a certification which provided:

CERTIFICATE OF APPROVAL FOR RECORDING

I HEREBY CERTIFY THAT THE SUBDIVISION PLAT SHOWN HEREON HAS BEEN FOUND TO COMPLY WITH THE SUBDIVISION REGULATIONS FOR JOHNSON CITY TENNESSEE, WITH THE EXCEPTION OF SUCH VARIANCES, IF ANY, AS ARE NOTED IN THE MINUTES OF THE PLANNING COMMISSION AND THAT IT HAS BEEN APPROVED FOR RECORDING IN THE OFFICE OF THE REGISTER.

The Certificate was signed by Moody on April 5, 2002. The plats were approved pursuant to Tenn. Code Ann. § 13-3-402(a)(1) which allows the Secretary of a Regional Planning Commission to approve the subdividing of a lot into no more than two lots without the Regional Planning Commission's approval. Specifically, this statute provides:

Regional planning commission platting authority – Standardized lots – Recording Plat by county register. – (a)(1) From and after the time when the regional planning commission of any region, as defined and created by the department of economic and community development, has adopted a regional plan which includes at least a major road plan or has progressed in its planning to the state of the making and adoption of a major road plan, and has filed a certified copy of such major road plan in the office or offices of the county register or registers of the county or counties lying in whole or in part in such region, then no plat of a subdivision of land within such region, other than land located within the boundaries of any municipal corporation, shall be filed for record or recorded until it has been approved by such regional planning commission, and such approval endorsed in writing on the plat by the secretary of the commission; *provided, that if the plat of subdivision divides the tract into no more than two (2) lots, the approval may be endorsed in writing on the plat by the secretary of the commission without the*

approval of the regional planning commission, upon certification by the planning staff of the regional planning commission that the subdivision complies with such regulations governing a subdivision of land as have been adopted by the regional planning commission pursuant to § 13-3-403; provided further, that no request for variance from such regulations has been requested. (emphasis added).

On September 10, 2002, Plaintiff attended the Commission's regularly scheduled meeting and challenged the subdividing of May's property. At that meeting, Plaintiff claimed the new plats did not comply with many of the Subdivision Regulations established by the Commission. For example, Plaintiff argued that § 4-5.1 of the Subdivision Regulations requires that "[a]ll *utility* services shall be placed underground in all new *subdivisions*." (emphasis in original). Plaintiff claimed May's new subdivisions did not comply with this and many other requirements for new subdivisions.

In defense of the new plats, Development Coordinator Steve Neilson argued that the division of May's lot into two lots did not create a "new" subdivision for purposes of the Subdivision Regulations. Instead, May's two new lots were in an already existing subdivision, and May was required to comply only with whatever restrictions were imposed on the other lots within that same subdivision. Neilson argued, among other things, it would make no sense to require a developer of a new home "to go to the expense of providing underground utilities where ... [the new home is located in] an existing subdivision where everything else is above ground" Neilson maintained that May's new plats were in compliance with the Subdivision Regulations and met the requirements of the existing subdivision within which the two lots were located.

Plaintiff also argued before the Commission that he and May had entered into a "joint driveway agreement" which "in essence says the pavement belongs to both of us and that neither one of us can do anything to damage the pavement, obstruct the pavement." Plaintiff also pointed out that when May's lot was subdivided, May was required by the Subdivision Regulations to dedicate a drainage and utility easement to the City. Plaintiff then claimed:

According to the Subdivision plat, he's pledged to you that 7.5 [foot] drainage easement [M]y claim on the pavement of the driveway blocks that, and so he's not able to deliver that and I assert superior interest in that portion in spite of what ... the subdivision plat shows.

After hearing Plaintiff's various arguments as to why the new plats were improper and Neilson's response as to why the new plats were in full compliance with applicable regulations, the Commission deferred taking any action until it could obtain a legal opinion from the city attorney on three specific issues. The three questions posed to the city attorney by the Commission, along with the city attorney's respective answers, are as follows:

1. Does the Planning Commission have authority to rescind a subdivision approval done by the Planning Department staff under the provisions of Article 3.3 of the Subdivision Regulations?

[Answer:] The Planning Commission does not have the authority to rescind a subdivision approval under State law. I have researched the powers of the Planning Commission as granted by the State. There is no provision for the Planning Commission to review and rescind a subdivision plat, once that subdivision plat has been approved.

2. What is the legal status of a new home which the property owner has received a building permit for and is near completion, if the subdivision is rescinded?

[Answer:] Because the Planning Commission lacks the authority [to] rescind an approved subdivision plat, the answer to the question #2 is pretermitted.

3. Does [Plaintiff's] transportation easement interfere with the Planning Commission's authority to require the property owner to dedicate a 7.5 foot drainage and utility easement along his property lines and dedicate additional right-of-way?

[Answer:] No private agreement between private parties can interfere with the Planning Commission's authority, which stems from the police powers granted by the State of Tennessee.

The Commission's next meeting was held on October 8, 2002. By this time, the Commission had the city attorney's responses to the three questions. In light of the city attorney's legal opinion, the Commission voted unanimously to take no action on Plaintiff's request that the Commission rescind the approval given to May to subdivide his property.

Plaintiff was not represented by an attorney throughout the proceedings before the Commission. Still proceeding *pro se*, Plaintiff filed a Petition for Writ of Certiorari with the Trial Court claiming that the Commission had acted "irresponsibly, capriciously, arbitrarily, and illegally" when it voted to take no action on his request to rescind the approval given to May to subdivide his property. The Trial Court granted Plaintiff's petition and a trial was held on September 2, 2003.

The first witness was Michael Marchioni ("Marchioni"), the Secretary of the Planning Commission. Marchioni testified that he has been the Commission's Secretary for two years. Marchioni stated that in addition to his position as Secretary, the Commission also has an Assistant Secretary and that position is held by James Moody ("Moody"). Marchioni testified that "minor

subdivisions” are handled by staff members and signed by Moody.¹ Marchioni identified the applicable Commission by-law addressing minor subdivisions. This by-law states, *inter alia*, that “[t]he Assistant Secretary shall assist the Secretary in carrying out the prescribed duties. The Assistant Secretary shall be authorized to sign Minor Subdivision plats and Condominium plats on behalf of the Planning Commission. The Planning Director for the City of Johnson City or designated representative shall serve as Assistant Secretary.” Marchioni acknowledged that there are approximately 150 minor subdivision plats approved by the Assistant Secretary on an annual basis.

Moody testified that he is the Planning Director for Johnson City. In addition, the Commission’s by-laws provide that the Planning Director also shall serve as the Assistant Secretary of the Planning Commission. Moody identified the plats he approved which subdivided the May property. Moody relied on Section 3-3 of the Subdivision Regulations when approving the plats. Section 3-3.1 provides:

Administrative Approval

A minor subdivision may be administratively approved by the Planning Commission staff, provided that no variance from the subdivision regulations has been requested. Any minor subdivision or replat which involves a variance from the subdivision regulations shall be approved by the Planning Commission. (emphasis in original).

Moody testified that by affixing his signature to the plats, he was certifying that May’s new plats “complied with all the regulations of the Regional Planning Commission.”

After all the proof was presented, the Trial Court made the following findings:

I find that in this case all legal requirements were met; however, the action of the assistant secretary in signing off on subject plats does not conform with the applicable statutes, where it says, “The secretary shall sign.” However, this technical difference does not and would not affect the result; therefore, the Court finds substantial compliance with this Statute.

The Court finds that the records as a whole reflects no illegality, no arbitrariness, no capriciousness and no fraud on the part of the Regional Planning Commission in regard to this matter.

¹Creation of a minor subdivision occurs when a single parcel or tract of land is subdivided into no more than two tracts. The original tract may or may not be part of an already existing and recorded subdivision plat. In the present case, May’s original tract of land and Plaintiff’s property were subject to an existing subdivision plat.

Accordingly the cause is dismissed and the court costs taxed to Mr. Green.

Judgment was entered, and Plaintiff appeals raising several issues. First, Plaintiff claims the Trial Court erred in denying him relief after specifically finding that the plat at issue did not conform to the applicable statute. Second, Plaintiff claims the Regional Planning Commission does have authority to rescind the approval of the May minor subdivision plats. Finally, Plaintiff claims the Trial Court erred when it concluded the subdivision plats and the approval process met all essential legal requirements.

Discussion

In *Lafferty v. City of Winchester*, 46 S.W.3d 752 (Tenn. Ct. App. 2000), this Court discussed the relevant standard of review in cases such as this, stating:

Whether characterized as administrative or quasi-judicial, *Wilson County Youth Emergency Shelter, Inc. v. Wilson County*, 13 S.W.3d 338, 342 (Tenn. Ct. App. 1999), decisions by local zoning boards and officials involve the exercise of the local government's police power to protect the health, safety, and welfare of their citizens. *Draper v. Haynes*, 567 S.W.2d at 465; *Hoover, Inc. v. Metropolitan Bd. of Zoning*, 955 S.W.2d 52, 54 (Tenn. Ct. App. 1997). In recognition of the policy that favors permitting the community decision-makers closest to the events to make the decision, the courts refrain from substituting their judgments for the broad discretionary power of the local governmental body. *McCallen v. City of Memphis*, 786 S.W.2d 633, 641-42 (Tenn. 1990); *Whittemore v. Brentwood Planning Comm'n*, 835 S.W.2d 11, 15 (Tenn. Ct. App. 1992).

The common-law writ of certiorari provides the procedural vehicle for reviewing the decisions by local zoning boards. This writ affords quite limited judicial review. *421 Corp. v. Metropolitan Gov't of Nashville*, [36 S.W.3d 469, 474 (Tenn. Ct. App. 2000)]. It empowers the courts to determine whether the local zoning board exceeded its jurisdiction; followed an unlawful procedure; acted illegally, arbitrarily, or fraudulently; or acted without material evidence to support its decision. *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342-43 (Tenn. 1983); *Hoover, Inc. v. Metropolitan Bd. of Zoning*, 955 S.W.2d at 54; *Hemontolor v. Wilson County Bd. of Zoning Appeals*, 883 S.W.2d 613, 616 (Tenn. Ct. App. 1994).

When the evidentiary foundation for a local zoning board decision is challenged using the common-law writ, the sufficiency of the evidence is a question of law. Hence, the courts must review the record de novo without presuming that the board's finding is correct. *Wilson County Youth Emergency Shelter, Inc. v. Wilson County*, 13 S.W.3d at 342. This review does not permit the courts to reweigh the evidence, *Hoover, Inc. v. Board of Zoning Appeals*, 924 S.W.2d at 904, or to scrutinize the intrinsic correctness of the decision. *421 Corp. v. Metropolitan Gov't of Nashville*, [36 S.W.3d 469, 474]. It envisions that the court will review the record independently to determine whether it contains "such relevant evidence that a reasonable mind might accept as adequate to support a rational conclusion." *Hedgepath v. Norton*, 839 S.W.2d 416, 421 (Tenn. Ct. App. 1992). A decision by a local zoning board will be considered arbitrary only when there is no evidence in the record to support it. *Sexton v. Anderson County*, 587 S.W.2d 663, 667 (Tenn. Ct. App. 1979).

Lafferty, 46 S.W.3d at 758-59.

In reviewing Plaintiff's various arguments before the Commission, as well as his brief on appeal, it is apparent to this Court that Plaintiff has taken bits and pieces of statutes and regulations and, by disregarding the remaining language, has altogether transformed them into something they are not. For example, Plaintiff argues that Tenn. Code Ann. § 13-3-402(a)(1), the statute authorizing approval of minor subdivisions under certain circumstances without Regional Planning Commission approval, specifically excludes all land located within a municipal corporation.² Based on this interpretation, Plaintiff then argues that because May's original tract was within the city limits when that tract was subdivided as a minor subdivision, it was "illegal." We are reluctant to read the clause relied upon by Plaintiff in such a restrictive manner and, in effect, invalidate hundreds of minor subdivision approvals within Johnson City.

The issue before the Trial Court was not whether minor subdivisions can be approved within the municipal limits of Johnson City. Rather, the Trial Court was reviewing the decision of the Commission not to take any action on Plaintiff's request and, more precisely, whether that decision was illegal, arbitrary or capricious. We believe the Commission certainly gave Plaintiff appropriate consideration and listened to his numerous concerns and complaints. After doing so, the Commission requested a legal opinion from the city attorney to assist them in resolving the matters presented by Plaintiff. In reliance on the advice of the city attorney, the Commission concluded that it did not have the authority to rescind the approval of the minor subdivision by the Assistant Secretary. In our opinion, this is more than adequate evidence to support the Trial Court's conclusion that the decision of the Commission on this point was neither arbitrary nor capricious.

² This statutory section was quoted verbatim at the beginning of the Opinion.

Plaintiff also claims that the decision of the Planning Commission was illegal. Plaintiff equates “wrong” with “illegal.” The role of the Trial Court was not to review the intrinsic correctness of the Commission’s reliance on the opinion of the city attorney that it did not have the authority to rescind the minor subdivision approval. In other words, whether the Commission was wrong because it actually had such power was not the issue before the Trial Court. *Cf. Henry v. Board of Claims*, 638 S.W.2d 825, 827 (Tenn. Ct. App. 1982)(“The Chancellor's action here was clearly to review the intrinsic correctness of the Board's decision ... and, when he did this, the Chancellor exceeded his power and jurisdiction under the common law writ of certiorari.... An erroneous decision of the Board, absent more, is not an illegal, arbitrary or fraudulent decision.”). We agree with the Trial Court that the Commission did not act illegally. Regardless of the numerous improprieties alleged by Plaintiff, it is nonetheless clear that the two new tracts created when May’s property was subdivided are subject to the same restrictions that are imposed on Plaintiff’s property and the other tracts within that subdivision. There simply is nothing “illegal” about these new tracts even if the Planning Commission was “wrong.”

The statute authorizing creation of minor subdivisions without approval of a regional planning commission requires the approval of a planning commission’s Secretary, not an Assistant Secretary as was done in the present case. Since we find nothing inherently illegal about the two new tracts of land, we must determine whether this procedural defect is sufficient to conclude the new tracts are “illegal” as claimed by Plaintiff and, if so, whether he is entitled to the relief he seeks. We respectfully conclude that this procedural impropriety is insufficient to warrant rescission of the approval of May’s minor subdivision. There is nothing in the record to suggest that the minor subdivision would not have been or should not have been approved had it been submitted to Marchioni instead of Moody for approval. A further concern is the fact that after obtaining approval of the minor subdivision, May proceeded to build a house on one of the new tracts. Even if we were to conclude that the minor subdivision approval was improper, we are far from convinced that rescission of the minor subdivision and requiring removal of the house would be an appropriate remedy, as Plaintiff suggests. As stated previously, such a holding could indeed invalidate hundreds of other minor subdivisions with the same, albeit minor, procedural defect.³

The final issue is Plaintiff’s claim that the Planning Commission’s refusal to act on his request was illegal because May dedicated a portion of his property to the city as a drainage and utility easement when May did not have that power in light of Plaintiff’s already existing easement on the same property. As with the previous issues, the Planning Commission relied on the advice of its attorney, and the intrinsic fairness or correctness of that decision is beyond the scope of review of either the Trial Court or this Court. If May interfered with Plaintiff’s property right in the easement when the property was subdivided and a drainage easement was granted to the city, then such an issue can be addressed by a court if Plaintiff chooses to pursue such an action against May. This does not mean, however, that the action of the Commission was arbitrary, capricious, or illegal.

³ It is important to note that the Assistant Secretary’s approval of minor subdivisions did not arise from a blatant disregard for the language of the statute, but because the Regional Planning Commission attempted to delegate this authority to the Assistant Secretary.

In light of the “quite limited judicial review” standard applicable here, and after reviewing the primary issues set forth by Plaintiff as well as various and sundry other points raised throughout his brief, we conclude the judgment of the Trial Court must be affirmed in all respects.

Conclusion

The Judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are assessed against the Appellant, Bobby MacBryan Green.

D. MICHAEL SWINEY, JUDGE